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10/502,021	07/20/2004	Jeanette Marcia Evans	J3646(6)	8722
201 7590 03/06/2009 UNILEVER PATENT GROUP 800 SYLVAN AVENUE AG West S. Wing ENGLEWOOD CLIFFS, NJ 07632-3100			EXAMINER SASAN, ARADHANA	
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/502,021

**Applicant(s)**

EVANS ET AL.

**Examiner**

ARADHANA SASAN

**Art Unit**

1615

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 01 December 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1, 4-8, 10-15 and 18-21 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 4-8, 10-15 and 18-21 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

***Status of Application***

1. The remarks and amendments filed on 12/01/08 are acknowledged.
2. Claims 2-3, 9, and 16-17 were cancelled.
3. Claim 1 was amended.
4. Claims 1, 4-8, 10-15, and 18-21 are included in the prosecution.

**NEW REJECTIONS NECESSITATED BY AMENDMENT:**

***Claim Rejections - 35 USC § 112***

5. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

6. Claim 1 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP § 2173.05(c). Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by "such as" and then narrow language. The Board stated that this can render a claim indefinite by raising a question or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required

feature of the claims. Note also, for example, the decisions of *Ex parte Steigewald*, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949). In the present instance, claim 1 recites the broad recitation "at least 50% by volume of the particles have an aspect ratio of at least 5 and a maximum width of 40 $\mu$ m", and the claim also recites "at least 20% by volume of the particles have an aspect ratio of at least 10 and a maximum width of 20 $\mu$ m" and "at least 5% by volume of the particles have an aspect ratio of at least 50 and a maximum width of 2 $\mu$ m" which is the narrower statement of the range/limitation.

#### **MAINTAINED REJECTIONS:**

The following is a list of maintained rejections:

#### ***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 1, 4-8, 10-15 and 18-21 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Brown et al. (EP 0 355 908 A1).

The claimed invention is a cosmetic or personal care composition comprising: gelled particles, wherein the gelled particles comprise water and at least 50% by volume of the particles have an aspect ratio of at least 5 and a maximum width of 40 $\mu$ m; and at least one cosmetically acceptable material selected from surfactants, hair conditioning agents, perfume or fragrances and hair styling polymers, wherein the composition is in

the form of a hair treatment product selected from the group consisting of shampoos, hair conditioners, hair tonics, and hair styling products.

Brown teaches a liquid based composition comprising at least one gelling polysaccharide that is present in the composition as microgels having a mean equivalent diameter of less than 50 microns (Page 2, lines 1-5 and 10-15). The composition "possesses the advantageous property that it disrupts at low strain (e.g. rubbing or mastication) to give a very smooth, fat-like consistency. This property makes that the fluid composition can suitably be turned into products such as skin creams, moisturizer lotions, ... etc., by the inclusion of suitable ingredients (e.g. perfume, colouring, flavouring)" (Page 2, lines 42-47). Kappa-carrageenan is disclosed as a polysaccharide whose solution naturally forms gels (Page 3, line 57 to Page 4, line 1). Water is disclosed as a preferred liquid in the composition (Page 4, lines 10-11). The use of the composition as a product for personal care including cosmetic products such as hair gels is also disclosed (Page 4, lines 24-27). Examples of substances that may suitably be incorporated in the personal care products include perfumes, emulsifiers (Page 4, lines 39 and 57), and surfactants such as Brij 58 (Page 10, Example 12, line 16). The process of preparing the composition includes dissolving the carrageenan in deionised water, briefly heating the solution, cooling the solution while applying shear (Page 8, lines 1-4). Example 8 discloses a formulation of kappa carrageenan (Page 8, lines 41-51) and Examples 4, 5, 7 -11 and 13-14 disclose formulations with a mixture of kappa and iota carrageenan (Page 7, line 54 to Page 11, line 24). Example 3 discloses the particles formed from the microgels (Page 7, lines 34-49).

Brown does not expressly teach that at least 50% by volume of the particles have an aspect ratio of at least 5.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to make a composition with a gelling polysaccharide that is present in the composition as microgels having a mean equivalent diameter of less than 50 microns, as suggested by Brown, and calculate the aspect ratio of the particles by dividing the length of the microgels with the width during the process of routine experimentation, and produce the instant invention.

One of ordinary skill in the art would have done this because given the dimensions of the microgels, it would be part of routine experimentation to calculate the aspect ratio of the particles. One with ordinary skill in the art would know that by dividing the dividing the length of the microgels with the width, the aspect ratio of the microgel particles can be calculated.

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Regarding instant claim 1, the limitation of a composition with gelled particles and the limitation of a maximum width of the particles of 40  $\mu\text{m}$  would have been obvious over the microgels having a mean equivalent diameter of less than 50 microns as

disclosed by Brown (Page 2, lines 1-5 and 10-15). The aspect ratio of at least 50% by volume of the particles of at least 5 would have been obvious because one with ordinary skill in the art would calculate the aspect ratio during the process of routine experimentation. The limitation of at least one cosmetically acceptable material would have been obvious over the perfume, emulsifiers (Page 4, lines 39 and 57), and surfactants such as Brij 58 (Page 10, Example 12, line 16) taught by Brown. The limitation of the composition in the form of a product selected from the group consisting of personal wash products, shampoos, hair conditioners, scalp lotions, hair tonics, and hair styling products would have been obvious over the personal care and cosmetic products including skin cream, moisturizer lotion and hair gel taught by Brown (Page 4, lines 24-27). The limitation of the aspect ratio would have been obvious over the microgels taught by Brown because one with ordinary skill in the art would modify the length and/or width of the microgels and calculate the aspect ratio during the process of routine experimentation. The limitation the maximum width would have been obvious over the microgels having a mean equivalent diameter of less than 50 microns as disclosed by Brown (Page 2, lines 1-5 and 10-15). The limitation of a hair treatment composition would have been obvious over the hair gel taught by Brown (Page 4, lines 24-27).

Regarding instant claim 4, the limitation of greater than 90% of the particles with a minimum width of  $0.5\mu\text{m}$  would have been obvious over the teaching by Brown that less than 5% of the particles appeared to have an equivalent diameter of more than 25 microns as disclosed by Brown (Page 7, lines 47-48). The recited width of the particles

would have been an obvious variant during the process of routine experimentation unless there is evidence of criticality or unexpected results.

Regarding instant claims 5-7, the gelling polymer would have been obvious over the kappa carrageenan taught by Brown (Page 8, lines 41-51, Examples 4, 5, 7 -11 and 13-14 on Page 7, line 54 to Page 11, line 24).

Regarding instant claim 8, the limitation of the gelled particles that are present in the composition in an amount of from 0.1% to 60% by volume of the composition would have been obvious over the composition disclosed by Brown that comprises at least 50% of the liquid (Page 12, claim 5) and where the concentration of the gelling polysaccharide, calculated on the liquid, is 0.1-15 wt.% (Page 12, claim 7). One with ordinary skill in the art would be able to convert the amount of the gelled particles from the % by weight to the % by volume of the composition during the process of routine experimentation.

Regarding instant claim 10, the limitation of the composition comprising from 1% to 50% by weight of one or more surfactants would have been obvious over the inclusion of 7.5 wt% of Brij 58 (nonionic surfactant) as taught by Brown (Page 10, lines 16-17). The limitation of a shampoo denotes a future-intended use and thus, does not accord patentable weight to the claims.

Regarding instant claims 11-14, the limitation of the composition comprising from 0.1% to 30% by weight of one or more hair conditioning agents and the limitation of the composition comprising from 0.1% to 10% by weight of one or more hair styling polymers would have been obvious over the personal care products and hair gel taught



by Brown (Page 4, lines 24-27). One with ordinary skill in the art would incorporate various agents in the personal care products including hair conditioners, hair styling polymers and hair benefit agents in the composition during the process of routine experimentation based on the desired intended use.

Regarding instant claim 15, the limitation of a method of treating would have been obvious over the use of the composition for personal care including the hair gel, as taught by Brown (Page 4, lines 24-27).

Regarding instant claims 18-20, the limitations of the process for producing the composition would have been obvious over the process of preparing the composition including dissolving the carrageenan in deionised water, briefly heating the solution, cooling the solution while applying shear, as taught by Brown (Page 8, lines 1-4).

Regarding instant claim 21, the limitation of the process for producing the composition comprising forming the gelled particles in the presence of the surfactant would have been obvious over the process of preparing the composition with the inclusion of 7.5 wt% of Brij 58 (nonionic surfactant) as taught by Brown (Page 10, lines 16-17).

7. Claims 1, 4-8, 10-15 and 18-21 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Tsaor et al. (US 5,726,138).

Tsaor teaches aqueous compositions containing hydrogel particles that "trap" water insoluble beneficial agents (Col. 2, lines 63-65). Tsaor teaches hydrogel particles "with controllable size and controllable gel strength [that] are prepared simply by first adding (e.g. injecting) an aqueous solution containing the said two polymers and the

water insoluble material into the said aqueous medium to form elongated soft polymer gel noodles; and the noodles are then cut/broken (e.g., through mixing or mechanical agitation) into desirable gel particle size" (Col. 1, lines 8-27). Advantages including enhanced deposition of a benefit agent on the skin or other substrate, and enhanced sensory properties (i.e. smooth and creamy feel) when the composition is rubbed on the skin are disclosed (Col. 1, line 62 to Col. 2, line 11). The aqueous composition comprises an aqueous solution, a hydrogel composition comprising hydrogel polymer(s) and a beneficial agent, where the hydrogel has a particle size greater than 25 micrometers (Col. 3, lines 4-32). The hydrogel compositions are designed for personal cleansing or skin care applications (Col. 3, line 65 to Col. 4, line 1). Tsaur discloses the process of preparing the hydrogel composition with low shear mixing processes along with manipulating the process parameters in order to modify the size of the composition (Col. 4, line 45 to Col. 5, line 27). Carrageenan is disclosed as a gel forming polysaccharide (Col. 6, lines 6-8). K-carrageenan is disclosed as a readily cross-linkable polymer (Col. 7, lines 6-7).

Tsaur does not expressly teach that at least 50% by volume of the particles have an aspect ratio of at least 5.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to make a compositions containing hydrogel particles with a particle size greater than 25 micrometers, as suggested by Tsaur, and calculate the aspect ratio of the particles by dividing the length of the particles with the width during the process of routine experimentation, and produce the instant invention.

One of ordinary skill in the art would have done this because given the dimensions of the particles, it would be part of routine experimentation to calculate the aspect ratio of the particles. One with ordinary skill in the art would know that by dividing the dividing the length of the particles with the width, the aspect ratio of the particles can be calculated.

Regarding instant claim 1, the limitation of a composition with gelled particles and the limitation of a maximum width of the particles of 40  $\mu\text{m}$  would have been obvious over the hydrogel particle size greater than 25 micrometers, as taught by Tsaur (Col. 3, lines 4-32). The aspect ratio of at least 50% by volume of the particles of at least 5 would have been obvious because one with ordinary skill in the art would calculate the aspect ratio during the process of routine experimentation. The limitation of at least one cosmetically acceptable material would have been obvious over the perfume (Col. 12, lines 31-34) and the 2% to 40% surfactant (Col. 3, lines 5-12) as taught by Tsaur. The limitation of the composition in the form of a product selected from the group consisting of personal wash products, shampoos, hair conditioners, scalp lotions, hair tonics, and hair styling products would have been obvious over the compositions that may be formulated as products for washing the skin or hair like shampoos, as taught by Tsaur (Col. 12, lines 22-26). The limitation of the aspect ratio would have been obvious over the hydrogel particles taught by Tsaur because one with ordinary skill in the art would modify the length and/or width of the particles and calculate the aspect ratio during the process of routine experimentation. The limitation the maximum width would have been obvious over the hydrogel particle size greater than 25 micrometers, as taught by Tsaur

(Col. 3, lines 4-32). The limitation of a hair treatment composition would have been obvious over the shampoos taught by Tsaur (Col. 12, lines 22-26).

Regarding instant claim 4, the limitation of greater than 90% of the particles with a minimum width of 0.5 $\mu$ m would have been obvious over the hydrogel particle size greater than 25 micrometers, as taught by Tsaur (Col. 3, lines 4-32). The recited width of the particles would have been an obvious variant during the process of routine experimentation unless there is evidence of criticality or unexpected results.

Regarding instant claims 5-7, the gelling polymer would have been obvious over the K-carrageenan as a readily cross-linkable polymer, as disclosed by Tsaur (Col. 7, lines 6-7).

Regarding instant claim 8, the limitation of the gelled particles that are present in the composition in an amount of from 0.1% to 60% by volume of the composition would have been obvious over the composition disclosed by Tsaur that comprises 0.1 to 30% by wt. hydrogel composition (Col. 12, lines 35-50). One with ordinary skill in the art would be able to convert the amount of the gelled particles from the % by weight to the % by volume of the composition during the process of routine experimentation.

Regarding instant claim 10, the limitation of the composition comprising from 1% to 50% by weight of one or more surfactants would have been obvious over the 2% to 40% surfactant (Col. 3, lines 5-12) as taught by Tsaur.

Regarding instant claims 11-14, the limitation of the composition comprising from 0.1% to 30% by weight of one or more hair conditioning agents and the limitation of the composition comprising from 0.1% to 10% by weight of one or more hair styling

polymers would have been obvious over the personal cleansing or skin care applications taught by Tsaur (Col. 3, line 65 to Col. 4, line 1). One with ordinary skill in the art would incorporate various agents in the personal care products including hair conditioners, hair styling polymers and hair benefit agents in the composition during the process of routine experimentation based on the desired intended use.

Regarding instant claim 15, the limitation of a method of treating would have been obvious over the hydrogel composition that is applied to the skin, as taught by Tsaur (Col. 4, lines 19-24).

Regarding instant claims 18-20, the limitations of the process for producing the composition would have been obvious over the process of preparing the hydrogel composition with low shear mixing processes along with manipulating the process parameters in order to modify the size of the composition, as taught by Tsaur (Col. 4, line 45 to Col. 5, line 27).

Regarding instant claim 21, the limitation of the process for producing the composition comprising forming the gelled particles in the presence of the surfactant would have been obvious over the process of preparing the composition with the inclusion surfactants, as taught by Tsaur (Col. 9, lines 33-37).

### ***Double Patenting***

8. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140

F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thornton*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

9. Claims 1, 5-7 and 19 remain rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4, 6 and 12 of U.S. Patent No. 7,169,427 (the '427 patent) in view of Brown et al. (EP 0 355 908 A1).

Although the conflicting claims are not identical, they are not patentably distinct from each other because the difference is that instant claims are drawn to a cosmetic or personal care composition. The teaching of Brown with respect to a liquid based composition comprising microgels of a gelling polysaccharide having a mean equivalent diameter of less than 50 microns and its use in personal care compositions and hair gels is stated above.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to make the composition recited in claims of the '427 patent, combine it with the composition comprising microgels its use in personal care compositions and hair gels, as suggested by Brown, and produce the instant invention.

One with ordinary skill in the art would do this because Brown teaches the incorporation of the microgels into personal care and hair gel compositions. Moreover, the recitation of a cosmetic or skin care composition is an intended use of the composition. Structurally the composition of instant claims is the same as the composition in the '427 patent.

Therefore instant claims are obvious over the claims of the '427 patent and they are not patentably distinct over each other.

***Response to Arguments***

**Rejection of claims 1-15 and 18-21 under 35 USC § 103(a)**

10. In light of the cancellation of claims 2-3 and 9, the rejection of these claims is rendered moot.

11. Applicant's arguments, see Page 6, filed 12/01/08, with respect to the rejection of claims 1-15 and 18-21 under 35 USC § 103(a) as being unpatentable over Brown et al. (EP 0 355 908 A1) have been fully considered but are not persuasive.

Applicants argue that from the micrographs provided in the Brown et al. patent, the shear gel particles do not appear to have the elongated structure required by the amended claims.

This is not persuasive because Applicants' assertion is speculative. Brown teaches microgels having a mean equivalent diameter of less than 50 microns (Abstract) that can be of a spherical or an irregular shape (Page 4, lines 8-9). One of ordinary skill in the art would have found it obvious to determine the particle dimensions of the microgel particulate composition as taught by Brown, during the process of

routine experimentation. This determination would include determining the length of the microgel particles and further dividing the length with the width to arrive at the aspect ratio, thereby rendering instant claims obvious over the teaching of Brown.

Applicants argue that particle structure can be affected by the process used to prepare the particles and point out Example 2, (comparative example) of the subject application, which discloses the production of gelled spheres from two biopolymers, and Example 1 which discloses the production of gelled fibers from 2 biopolymers.

Applicants argue that in addition to their physical differences, gelled fibers and gelled spheres can exhibit significant differences in performance. Pointing to Example 5 of the subject invention, Applicants argue that micrographs obtained by scanning electron microscopy showed that the gelled fibers had entangled amongst the hair fibers, whereas the gelled spheres tended to be washed away, and that the gelled fibers showed greater substantivity to the hair. Applicants argue that particle form can affect composition properties.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., gelled fibers, gelled spheres, and particle form) are not recited in the rejected claim(s). Instant claims recite gelled particles and do not differentiate between gelled fibers and gelled spheres. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). The determination and



modification of the aspect ratio of the particles would have been an obvious determination over the teaching of Brown during the process of routine experimentation.

The components of the composition (Kappa-carrageenan as microgel) and the limitations of the particle size are taught by Brown. A chemical composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. Please see MPEP 2112.01.

Therefore, the rejection of 11/10/08 is maintained.

**Rejection of claims 1-15 and 18-21 under 35 USC § 103(a)**

12. In light of the cancellation of claims 2-3 and 9, the rejection of these claims is rendered moot.

13. Applicant's arguments, see Page 8, filed 12/01/08, with respect to the rejection of claims 1-15 and 18-21 under 35 USC § 103(a) as being unpatentable over Tsaur et al. (US 5,726,138) have been fully considered but are not persuasive.

In light of Applicants' cancellation of claims 2-3 and 9, the rejection cited above is rendered moot.

Applicants argue that Tsaur is described as having a particle size in the range of about greater than 25 micrometers and that Tsaur does not expressly disclose particles having the size distribution disclosed by amended claim 1.

This is not persuasive because particle size is a modifiable parameter that one of ordinary skill in the art can modify during the process of routine optimization depending on the desired product functionality, as also taught by Tsaur (Col. 4, line 45 to Col. 5,

line 27). The recited width of particle size (maximum of 20 $\mu$ m and maximum of 2 $\mu$ m) are obvious variants in light of the modification of the size of the composition by manipulating process parameters.

Applicants argue that the focus of Tsaur is on the production of skin treatment compositions, not hair treatment compositions as in the subject claims.

This is not persuasive because Tsaur teaches shampoo compositions (Col. 12, lines 22-26).

Therefore, the rejection of 11/10/08 is maintained.

**Rejection of claims 1, 3, 5-7 and 19 under nonstatutory obviousness-type double patenting**

14. In light of the cancellation of claim 3, the rejection of this claim is rendered moot.

15. Applicant's arguments, see Page 9, filed 12/01/08, with respect to the rejection of claims 1, 3, 5-7 and 19 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4, 6 and 12 of U.S. Patent No. 7,169,427 (the '427 patent) in view of Brown et al. (EP 0 355 908 A1) have been fully considered but are not persuasive.

Applicant argues that the claims of the subject invention (drawn to hair treatment products that contain fiber- like gelled particles) are not obvious over the claims of the '427 patent (which say nothing about personal care compositions generally or hair care compositions particularly, and instead include claims to spreadable dairy products) in view of Brown et al., a patent which seemingly does not disclose gelled particles in the form of elongated fibers having the dimensional requirements of the '427 patent.

This is not persuasive because although claims of the '427 patent are not drawn to a cosmetic or personal care composition, structurally, the composition of instant claims is the same as the composition in the '427 patent. The recitation of a cosmetic or hair care composition denotes a future-intended use and thus, does not accord patentable weight to the claims. The combination of the '427 patent with Brown renders instant claims obvious to one of ordinary skill in the art and therefore they are not patentably distinct over each other.

Therefore, the rejection of 11/10/08 is maintained.

### ***Conclusion***

16. No claims are allowed.
17. Since the new ground(s) of rejection were necessitated by applicant's amendment, **THIS ACTION IS MADE FINAL**. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

18. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Aradhana Sasan whose telephone number is (571) 272-9022. The examiner can normally be reached Monday to Thursday from 6:30 am to 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward, can be reached at 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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